No. 7695

United States Circuit Court of Appeals
For the Ninth District

GUS B. GREENBAUM, CHARLES GREENBAUM and WILLIAM GREENBAUM,
Appellants,

—vs—

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona

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REPLY BRIEF OF APPELLANTS

In the short time allowed we are, of course, unable to fully reply to the Government's brief in this case, and, indeed, an examination of that brief indicates that on many points no reply is necessary, as we have thoroughly covered all the points in issue in our opening brief. However, inasmuch as counsel for the Government have misconstrued the record concerning the identification, or lack of identification, of the Addie Driscoll letter (Government's Exhibit 43 in Evidence), we feel that it is our duty to remove any confusion there may be in the Court's mind arising from the argument advanced by counsel for the Government in their brief concerning said exhibit.

* Where figures only appear in parentheses, in this brief, they refer to pages in the printed Transcript of Record.

We will also touch briefly on one or two of the other points attempted to be answered in the Government's brief.

THE INDICTMENT LETTER, GOVERNMENT'S EXHIBIT 41-U FOR IDENTIFICATION, ADMITTED IN EVIDENCE, OVER OBJECTION, AS GOVERNMENT'S EXHIBIT 43, WAS NOT IDENTIFIED AND, THEREFORE, THERE IS NO PROOF THAT THE DEFENDANTS MAILED, OR CAUSED TO BE MAILED, SAID EXHIBIT

As we understand it, counsel for the Government, after arguing that the signature was identified by witness Brandt, tacitly admits that there was no identification of the signature on Government's exhibit 43 by saying in effect that there was no proper objection raised in the court below. How can counsel say this in view of the record? When the document was offered in the evidence the following objection was made, as shown by the Transcript of Record, pages 272 and 273:

> "Mr. HOWE: We object to the Government's offer in evidence upon the ground and for the reason that it does not connect nor tend to connect the defendants Greenbaum or any one of them with the offense charged and shows on its face that said defendants were not a party either to the mailing of the letter, or the letter which elicited that response, incompetent, irrelevant and immaterial as far as the defendants Greenbaum or any one of them are concerned.

MR. REIN: May I add the further suggestion there is no adequate proof of mailing by the defendants Greenbaum.

THE COURT: Objection overruled.

MR. REIN: Exception."

The very issue was the mailing of the letter and the objection that it did not connect nor tend to connect the Greenbaums with the offense charged and that it showed on its face that the Greenbaums were not parties either to the mailing of the letter or the letter which elicited that response would seem to be all sufficient; but in order that there could be no misunderstanding the further objection was made that there was no adequate proof of the mailing of the letter by the Greenbaums. This is more than sufficient. That the appellants persisted in their objections goes without saying, for at the conclusion of the Govenment's case the appellants moved for a directed verdict, and one of the grounds was that the Government had failed to prove beyond a reasonable doubt that the letter of April 9, 1930, was mailed or caused to be mailed by the Greenbaums, or either of them, and the same identical motion was made at the close of all the evidence. (Subdivision 18, page 454, Transcript of Record.) 454

And again, at the conclusion of the Court's instructions, Mr. Whitney, one of counsel for appellants, said:

"I believe in your charge, Your Honor stated generally that the use of the United States mails

to defraud was the gist of the offense, which is true as an abstract proposition, *but we think it should be restricted to the letter of April* 9, 1930, *which is the only count in the indictment.*"
And the Court then said:

"I thought that it was. Without proof of the mailing of the letter of April 9, 1930, to Mrs. Driscoll, there could be no conviction in this case." (Transcript of Record 481).

In their assignments of error (Assignment IV, Subdivision C, page 492, Transcript of Record) the appellants again set out that

"there was no competent or substantial evidence to show that the defendants-appellants mailed or caused to be mailed the letter set forth in count one of the Indictment."

And in Assignment of Error No. XIV, shown on page 506 of the Transcript of Record, it is pointed out that the lower court erred in admitting in evidence Government's Exhibit 43, and one of the reasons assigned is,

"that there was no adequate proof that the defendants-appellants mailed or caused to be mailed said letter."

In the Specification of Errors Relied Upon the appellants again, in Specification of Error No. 2, raised the question that there was no competent substantial evidence to show appellants mailed or caused to be mailed the letter set forth in Count One of the Indictment. (See Brief of Appellants, Page 47).

And again, by Specification of Error numbered 14, the question is presented that Government's Exhibit 43 was not properly admitted in evidence, (See Brief of Appellants, Pages 60 and 61)

> "for the reason that there was no adequate proof that defendants-appellants mailed or caused to be mailed said letter."

Aside from this, appellants moved to strike said exhibit (449).

In view of this, how can the Government contend that this question was not properly raised in the court below and persisted in throughout the entire proceedings?

As stated in our opening brief (beginning with the last paragraph on page 192) there was no identification whatsoever of the signature to the letter, the mailing of which is alleged in the first count of the indictment to be the offense with which the appellants were charged and upon which offense only they could be convicted. This letter to Addie Driscoll, which is dated April 9, 1930, was admitted in evidence as Government's Exhibit 43 and, as stated in our opening brief, was originally marked Government's Exhibit 41-U for identification and was part of a batch of letters originally marked Government's Exhibit 41 for identification. The Clerk marked this batch of letters, upon the instruction of the Court, as 41-A, 41-B, 41-C, etc. (Transcript of Record, Page 270).

Counsel for the Government, in their brief, say:

"Witness Brandt testified that he was familiar with M. Loveland's signature and that the first letter was signed by Mrs. Loveland (268). A very significant fact which we wish to direct the Court's attention to in connection with Brandt's identification is that the first letter in the group introduced in evidence was Government's Exhibit 43, the indictment letter. The other letters of the group were introduced in evidence as Exhibits 44, 45, etc. All of which indicates that the signature of M. Loveland on Exhibit 43 was identified by Brandt, he having identified the signature of all of the letters of the group (Exhibit 41 for identification) which were introduced in evidence, and the first letter introduced bore the signature of M. Loveland." (See page 43 of the Government's Brief).

If counsel intends to convey the impression to the Court that the first letter in Exhibit 41 for identification was 41-U, which was eventually introduced in evidence as Exhibit 43, they must have inadvertently misread the record. Brandt stated, at page 268 of the Transcript of Record:

"I am familiar with the signature of Mrs. Loveland, A. E. Sanders and Gus Greenbaum. The first letter of Government's Exhibit 41 for identification is signed by Mrs. Loveland. The second letter by A. E. Sanders."

Now then, turning to page 270 of the Transcript of Record, it will be noted that the court instructed the clerk to take Government's Exhibit 41 for identification and mark each letter 41-A, 41-B, etc. Bear in

mind that the disputed letter was marked 41-U for identification. Now then, turning to page 274 of the Transcript of Record, the witness Driscoll stated:

> "I received Government's Exhibit 41-A for identification (the first letter of Government's Exhibit 41 for identification) through the mails at Douglas, Arizona. It was enclosed in a stamped envelope addressed to me."

Government's Exhibit 41-A for identification was received in evidence and marked Government's Exhibit 44, which is a letter dated June 18, 1929, signed by M. Loveland. The next letter of the group of Government's Exhibit 41 for identification, identified by Brandt, was 41-B for identification, which was introduced as Government's Exhibit 45. This letter Brandt states was signed by A. E. Sanders, and the letter will be found on page 275 of the Transcript of Record, showing that it was dated July 16, 1929, and signed by A. E. Sanders.

Government's Exhibit 41-U for identification was nowhere identified, and the record does not in any way bear out the contention of counsel for the Government that the first letter of Exhibit 41 for identification was marked 41-U for identification, or that the first letter of that group was introduced first. It will be noted that none of the exhibits marked for identification, that is, 41-A, 41-B, etc., were introduced in evidence until 41-U was offered and received. After 41-U for identification was offered and received, then the District Attorney offered the other letters in their order. The District Attorney, knowing that 41-U was the indictment letter probably thought

that he would introduce that first and then follow with the other letters in the group.

A critical examination of the evidence given by all the witnesses concerning the mailing of letters in this case discloses that at no time, either by direct or circumstantial evidence, was it shown that the defendants mailed or caused to be mailed Government's Exhibit 43. Certainly there was no direct evidence of that fact. The letter does not purport to be signed by one of the appellants, but it purports to be signed "Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary" and apparently was written on the letterhead of "Bond and Mortgage Corporation". There was evidence to the effect that M. Loveland was employed by, and worked for, the appellants, *but there is no evidence that she signed this particular letter.* Therefore the one important link in the chain of circumstances is missing, i. e. the identification of the signature on the letter. The first testimony introduced by the Government for the purpose of identifying the various letters and circulars contained in Government's Exhibit 41 for identification was by Tom H. Brandt, and is shown on pages 268, 269 and 270 of the Transcript of Record. Of the letters that were admitted in evidence (and included in 41 for identification) Brandt identified the signatures on the following:

Government's Exhibit 44, signed by M. Loveland (274);

Government's Exhibit 45, signed by A. E. Sanders (275);

Government's Exhibit 46, signed by E. B. Horne (275);

Government's Exhibit 47, signed by M. Loveland (276);

Government's Exhibit 48, signed with the rubber stamp facsimile of A. E. Sanders' signature (276);

Government's Exhibit 49, signed with the rubber stamp facsimile of A. E. Sanders' signature (277);

Government's Exhibit 50, signed with the rubber stamp facsimile of A. E. Sanders' signature (278);

Government's Exhibit 51, signed with the rubber stamp facsimile of A. E. Sanders' signature (278);

Government's Exhibit 52, signed by K. C. Van Atta (279);

Government's Exhibit 53, signed by mimeographed signature of A. E. Sanders (280);

Government's Exhibit 59, signed by Tom H. Brandt (280);

Government's Exhibit 54, signed by G. C. Partee (281, 288);

Government's Exhibit 56, signed by mimeographed signature of H. D. Sanders and G. C. Partee (289).

Nowhere can it be found in the testimony of Brandt that this letter, Government's Exhibit 43, vital to the Government's case, was identified. Mrs. Driscoll's testimony on page 272 of the Transcript of Record is as follows:

"Referring to Government's Exhibit 41-U for identification, consisting of a letter and envelope, I will say that I have seen it before at the Douglas Post Office, when I took it out of the mail. I received this letter through the United States mails. I am pretty sure that it was enclosed in that envelope, *but wouldn't swear it is the same envelope.* I turned the letter and envelope over to the Post Office Inspector Means. The letter was in this envelope, or one identical with it, *as far as the address and letterhead is concerned*, when I received it."

On page 291 of the Transcript of Record, Mrs. Driscoll further testified concerning this letter:

"I received the letter of April 9, 1930, marked Government's Exhibit 43, in evidence; I received other correspondence from the Bond and Mortgage Corporation or the Arizona Clarence Saunders Stores, Inc."

So much for the attempted identification of Government's Exhibit 43.

We will now examine the record concerning the custom of appellants concerning mail matter that was sent out by them in the course of their business dealings. Margaret Romley (page 271 of the Transcript of Record) testified that she was employed by the Greenbaums in March of 1929 for a period of about seven or eight months. This would indicate that if she was employed for the full eight months that *she ceased her employment in November* 1929. *The letter, the identification of which is disputed, was not mailed until*

April 9, 1930, *according to the evidence, or some five months after her employment ceased,* so whatever the witness Romley has to say cannot in any way affect this particular letter, as the date of the letter is too remote from the time she ceased her employment with the appellants. However, she testified that,

> "I worked in their office in the Security Building, mailing out *circulars* and *form letters.* Employed in the office besides myself were Mrs. Loveland, Miss Fitts, Mrs. Galland and Mrs. Bellas. Mrs. Loveland was bookkeeper and stenographer. The general custom in regard to handling letters and circulars was to go through the files and get the names, and we addressed the envelopes for the circulars, folded them, and sent them out. This was done under the direction of Mr. Gus Greenbaum. *We had two or three different form letters that were sent out. Mr. Gus Greenbaum's and Mrs. Loveland's signatures were on some of them.* Refering to Government's Exhibit 41-L for identification, being the letter dated July 1st, 1930, it was signed with the facsimile of A. E. Sanders, made with a rubber stamp. I placed *some* of the letters that were sent out in the mail by either taking them to the post office or putting them down the mail chute in the Security Building."

On cross-examination witness Romley testified:

> "I have no recollection of just what or when any particular form of these circulars went out. The rubber stamp I spoke of was kept in plain view on one of the desks in the office."

Where is there any testimony here that would even remotely identify the signature of M. Loveland on the letter in question? It would seem from the testimony of witness Romley that she only referred to form letters and circulars, because she says: "We had two or three different form letters that were sent out. Mr. Gus Greenbaums' and Mrs. Loveland's signature were on some of them." By no stretch of the imagination could it be said that the letter set forth in count one of the Indictment, the identification of which is now in issue, was a form letter or circular.

Adverting to another witness produced for the purpose of showing custom — his testimony likewise fails to identify the letter in issue. This witness, Sam W. Hamilton, (Transcript of Record, beginning on page 341 and ending on page 344) testified in connection with Gus Greenbaum as follows:

> "I called on him for the purpose of soliciting business in the line of printing and engraving. I took an order for printing some letter-heads and envelopes, and some bonds."

Thereupon, Government's Exhibit 85 and 86 were received in evidence. Exhibit 85 being a blank letter-head of Arizona Clarence Saunders Stores, 701 Security Building, Phoenix, with envelope attached. Exhibit 86 was a blank letter-head of Bond and Mortgage Corporation, Security Building, Phoenix, Arizona, with envelope attached.

We find, therefore, that the letter addressed to Addie Driscoll, and which is the letter upon which the indictment is based and founded, was marked by the

Clerk "41-U for Identification". There was no identification whatever of the signature attached to such letter as being that of 'M. Loveland". Neither witness Brandt, nor any other witness, was asked to identify the signature on Government's Exhibit 41-U for Identification, but nevertheles it was offered and, over the objection of the defendants, admitted as Government's Exhibit 43. No matter that this letter, Exhibit 43, was received by Addie Driscoll through the mail; no matter that it was on the letterhead of the Bond and Mortgage Corporation; no matter what the custom in the office of such company may have been as to the mailing of letters, neverthless, as to this particular letter, there was no proof that the signature attached thereto was that of M. Loveland, or of any of these defendants, nor that it was signed by the authority of any of these defendants; nor that the defendants caused this letter to be signed or mailed.

The Government attempts to meet this entire want of identification of signature by saying that the jury had the right to compare signatures. That is, the United States Attorney argues that because the signature of M. Loveland was identified on Exhibit 44, and some other letters in Exhibit 41 for identification, they could compare the last mentioned exhibits with 43 for the purpose of determining the authenticity of the signature on 43. That may be true if 43 was properly admitted in evidence, *but such is not the case.* A jury cannot compare the signature of an instrument properly admitted of record with some instrument not before them, such as something they read in the newspaper or see in a photograph. Neither can it be said that the members of a jury can compare the signature of an instrument properly admitted with one improp-

erly admitted. The instrument improperly admitted is not deemed to be a part of the record which the jury can examine. This Exhibit 43 should not have been admitted in evidence and should not have been exhibited to the jury until the signature of M. Loveland was identified, and when admitted in the absence of such identification it is a nullity and can be used for no purpose whatever, either for that of comparison or otherwise.

The following cases we believe will convince this Honorable Court that Government's Exhibit 43 was, over our objection, wrongfully received in evidence because the signature on the exhibit was not identified and hence there was no showing by circumstantial evidence that the defendants mailed or caused to be mailed that exhibit within the meaning of Section 338, Title 18, U. S. C. A. In this connection see the following cases:

Beck v. *United States*, (C. C. A. 8), 33 Fed. (2d) 107, 111;

Freeman v. *United States*, (C. C. A. 3), 20 Fed. (2d) 748, 750;

United States v. *Baker*, (C. C. A. 2), 50 Fed. (2d) 122, 124;

Brady v. *United States*, (C. C. A. 8), 24 Fed. (2d) 399, 403;

Davis v. *United States*, (C. C. A. 3), 63 Fed. (2d) 545;

Berliner v. *United States*, (C. C. A. 3), 41 Fed. (2d) 221, 222;

Cohen v. *United States*, (C. C. A. 3), 50 Fed. (2d) 819, 821;

Underwood v. *United States*, (C. C. A. 6), 267 Fed. 412;

The above are all the cases we have been able to find involving the use of the United States mails in furtherance of a scheme to defraud that consider the point now under consideration. In some of these cases the facts are distinguishable from the case now being considered but all of them are in principle the same insofar as the law is concerned.

In *Beck* v. *United States*, (C. C. A. 8), 33 Fed. (2d) 107, the Court said, at page 111:

> "That the mails were used is clear. That the defendant Beck is bound if Barrett used the mails in the ordinary course is not open to serious dispute. The law does not now require an intent to use the mails as part of the scheme, as formerly. It is sufficient if they are used. Beck placed Barrett in the position of general manager of the corporation, leaving to him the direct management of the business while Beck primarily looked after his own business. Beck employed and paid stenographers, which shows a contemplated use of the mails. *Aside from the fact that the letters purport to bear Barrett's signature, the record is barren of proof that he signed them or mailed them. This is insufficient to bind either Barrett or Beck.*" (Emphasis ours).

In *Freeman* v. *United States*, (C. C. A. 3), 20 Fed. (2d) 748, (cited in our opening brief at page 193) the Court said, at page 750:

> "The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such a scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that it may be proved by the presumption arising from the postmark, * * * or, under the general rule that a postmark is prima facie evidence, that the envelope had been mailed, * * * That, concededly, is the rule in civil cases; but it leaves unanswered the question — *vital in criminal cases* — who mailed it? The statute imputes the crime to "whoever * * * shall * * * place or cause to be placed any letter in the mails, * * * " and the indictment here charged that the three defendants did that thing. That charge, we hold, must be proved by evidence. The evidence need not be direct; that is, it need not be that the defendants were seen mailing the letter; it may be circumstantial, that is, evidence of acts or doings, or business custom of the defendants, from which their act of mailing or their act which caused the letter to be mailed may reasonably and lawfully be inferred. There are many cases of this kind. * * *; but in each case there is some act or group of acts on which the fact that the accused mailed the letter or caused it to be mailed can be hinged.

No case has been called to our attention and none has been discovered by our independent re-

search where conviction has been sustained when there is no evidence, direct or circumstantial, that the accused mailed the letter. In the case at bar there is ample evidence of the receipt of the three letters through the mail, but the only circumstance that connects Freeman with mailing them, or any of them, *is that the enclosures bore his signature and that a month or more before the letters were received Freeman had, in one instance, been asked for a statement of his company* * * * Moreover, we think the fact that Freeman signed the statement is not proof that he mailed it. *As to Rosin and Paskow, there is no evidence connecting them with mailing the statement other than it was written on their company's stationery and enclosed in the company's envelope.*

On this issue, we are constrained to reverse the judgment as to the three defendants and direct that they be given a new trial in harmony with this opinion." (Emphasis ours).

In *United States* v. *Baker*, et al., (C. C. A. 2), 50 Fed. (2d) 122, the Court, at page 124, said:

"If the guilt of an accused under the mail fraud statute requires no more proof of the mailing of a letter than proof that it was written in one city and received in another, the task of a federal prosecutor in such a case is much simpler than had hitherto been supposed, * * * and 18 U. S. C. A. Sec. 338, would become by construction not a mail fraud but a letter fraud statute, lacking in the essential basis of federal jurisdiction which the use of the mail provides. To avoid such a perversion

of the statute, *in the guise of passing upon the weight of evidence, it is necessary to insist upon real proof, circumstantial or direct, that, beyond a reasonable doubt, the mail was used.*

Judgment reversed."

In *Brady* v. *United States,* (C. C. A. 8), 24 Fed. (2d) 399, the Court said, at page 403:

"There is no direct evidence that defendants wrote the letters or that they deposited them in the post office directed to Mergen with postage prepaid, or that they otherwise caused them to be delivered to Mergen through the mails. * * * *The genuineness of the purported signatures to the letters does not appear to have been directly established.* The fact that the defendants caused such letters to be delivered to Mergen through the post office at Beloit, Kan., must be inferred, if at all, from the fact that the letters purport to have been written either by McClintock or by Brady, that the letters are addressed to Mergen at Beloit, Kan., and that Mergen testified he received such letters through the mail. To sustain the judgment, we must hold that the jury were warranted in presuming from this evidence, and this evidence alone: First, that the letters were inclosed in envelopes addressed to Mergen at Beloit, Kan.; second, that the defendants caused the letters to be duly stamped and mailed; and, third, that the post office at Beloit, Kan., received them and delivered them to Mergen. To do this, we would have to permit presumption to be built upon presumption. From the fact that the letters contained in themselves the address of L. A. Mergen, Beloit, Kan.,

the presumption would have to be drawn that they were enveloped, properly stamped, and addressed to Mergen at Beloit, Kan. From this presumption, the presumption would have to be raised that the defendant Brady caused them to be mailed, so addressed, and from the last presumption the presumption would have to be drawn that the post office establishment delivered them at Beloit, Kan., to Mergen. It is well settled that presumptions cannot be based on presumptions * * * We conclude that the evidence was insufficient to support the verdicts of guilty. See *Freeman* v. *U. S.* (C. C. A. 3) 20 F. (2d) 748." (Emphasis ours).

In *Davis* v. *United States*, (C. C. A. 3) 63 Fed. (2d) 545, the Court said, at page 546:

"Thus the sole question is whether that was enough evidence on which to submit the issue of mailing. This court * * * ruled in effect that the charge of mailing, an essential element of the offense, particularly important because it is also the jurisdictional element, must be proved, and that evidence that a letter was received through the mail by one person is not proof that it had been mailed by the defendant. In other words, to justify submission of the question of mailing by the defendant there must be evidence of that fact, direct or circumstantial. The learned trial judge, knowing these cases, did not disregard them but submitted the case on a charge which correctly and adequately stated the law, *in the belief, however, that 'there is some evidence for this jury to consider as to the defendant having mailed that statement.'* Of course, if there were some evidence

legally substantial, some circumstance from which an inference of mailing by the defendant could permissibly be drawn, there was no error, yet we are constrained to say that we cannot find any.

The government points to eight facts as culpable circumstances, all of which, we find, on examination, are unrelated to the offense and, when subjected to the legal test, are as consistent with the hypothesis that the defendant did not mail the statement as they are consistent with the government's contention that he did mail it. A conviction on these circumstances alone would have required the trial judge to set it aside. The inescapable conclusion is that in this record there is no evidence that the defendant mailed the statement or caused it to be mailed other than the fact that the Board of Trade received it through the mail. That, standing alone, and standing, as it does, wholly apart from any evidential circumstances, is under the authorities not enough.

The judgment of sentence is reversed." (Emphasis ours).

The Government in support of its position infers that appellants dominated the affairs of the company and exercised control of its business, and that letters written on the stationery of the company, and *seemingly* from its place of business, is sufficient to justify the finding that appellants caused such letter to be placed in the post office. In support of its position the Government cites:

Levinson v. *United States*, 5 Fed. (2d) 567;

McIntyre v. *United States*, 49 Fed. (2d) 769;

Havener v. *United States*, 49 Fed. (2d) 196;

Cochran v. *United States*, 41 Fed. (2d) 193.

(See page 45 of the Government's brief).

The *Levinson* case, above cited, insofar as the mailing of the letter was concerned, was based on the question of venue. The question was: "Where was the letter mailed from?" It is not in point with the case at bar, and some of the *dicta* therein is clearly at variance with the many cases cited by us in this brief.

In the *McIntyre* case the question was — were the letters mailed within the district where the proceeding was had. The court calls attention to the fact that that was the only question involved in the case— not that the defendant mailed the letter, but where did he mail it. This is another case involving venue. The opinion states that the mail matter in issue was signed by the defendant.

In the *Cochran* case the facts are very much stronger than in the case at bar. In that case the letters were mailed on the letterhead of the concerns involved in the scheme. They were shown to have been written by the employees in the office. Some of them were signed personally by some of the defendants and it was shown that they were all written under the direction of those in charge of the stock selling campaign. They apparently were all form letters, and were mailed to and received by the various addressees named. It is very significant in this case that the

court stated "*When offered in evidence they were not objected to that there was not sufficient proof that they had been mailed*" and the court states further that "*It is quite apparent that the claim now made to the effect that the evidence of mailing is insufficient is an afterthought.*" So this case is not in point, as with the appellants in the instant case the question of mailing was not an afterthought but a thought that they had all through the proceedings, as will be shown by the record.

In the *Havener* case the question raised by counsel for the defendant was that there was no evidence to show that the defendant caused the letter, alleged in the indictment, to be delivered by registered mail, according to the direction thereon, *for the purpose of executing such scheme to defraud*, and the court held that the use of the mails in furtherance of a scheme may be established by circumstantial evidence, and the circumstances in that case were that the letter was received by Biles by registered mail, through the post office at Hill City, Kansas. It was addressed to him. It referred to prior transactions between the defendant and Biles; it purported to have been written by the defendant; it enclosed a note purported to have been executed by the defendant. Biles returned the note to the defendant. *When Biles demanded payment from the defendant of the note forwarded in with such letter defendant did not deny that it was his note but stated he could not pay it because he did not have the money.* Said the Court:

> "*This was a tacit admission that defendant had forwarded such note and letter through the United States mails.* It is improbable that anyone but de-

fendant and Biles were sufficiently acquainted with the prior transactions to have written such a letter. *These circumstances*, in our judgment warranted the jury in finding that the defendant forwarded the letter by registered mail directed to Biles at Hill City, Kansas." (Emphasis ours).

In the case at bar the signature on Exhibit 43 was not in anywise identified and there are no circumstances legally sufficient to either admit the letter in evidence or to permit the jury to infer that the appellants mailed or caused to be mailed said letter. This in our opinion is reversible error.

INDICTMENT

We feel satisfied that counsel for the Government have not met the argument in our opening brief concerning the insufficiency of the indictment so that we will not burden the court with any further argument on that point, except that we desire to call the Court's attention to a case cited by counsel, on page 14 of their brief, to-wit, *Worthington* v. *United States*, 64 Fed. (2d) 936. Counsel say: "*This is one of the latest* decision on this point" (duplicity). They fail to call the Court's attention to the statement in the case that, "*If the charge sets forth more than one scheme to defraud, it is duplicitous.*" That is what we are contending here — that there is more than one scheme to defraud set forth in the indictment in the instant case.

ADMISSION IN EVIDENCE OF STATEMENTS PREPARED FROM BOOKS OF ACCOUNT, BEING EXHIBITS 89, 90 AND 91

On this feature of the case we feel that counsel for the Government have wholly failed to meet the argument advanced by us in our opening brief (pages 126 to 166, inclusive). Counsel in their brief, at page 19, say:

> "Appellants' contention is that the books and records underlying these exhibits would not be admissible against appellants and that, therefore, the statements themselves were not admissible. We believe that the determination of the admissibility of the books and records will determine the merits of appellants' Proposition II.
>
> On page 129 of their brief, appellants set forth the grounds upon which Proposition II is based. Appellants' contention that, because they had no connection with the books and had no control over them, the books would be hearsay as to appellants, has no support in the authorities cited by appellants and we have found none supporting that theory.
>
> The Government, having produced evidence of representations made by appellants relative to the financial status of the corporation, its management, earnings, profits and future prospects, it then became incumbent upon the Government to prove the falsity of one or all of these representations. * * * "

In order that there be no confusion we desire to say that if there was a proper foundation laid for the admission in evidence of the books and records underlying Exhibits 89, 90 and 91, and the books had been properly identified, and shown to be the original records, and to be correct, then they would not be hearsay as to defendants; but that is not the situation here, as an examination of the record will disclose and as pointed out in our opening brief. Counsel for the Government admitted that it was incumbent upon the Government to prove the falsity of the representations as to the financial condition of the company, and that is just what we have been contending all along. The appellants, having had no control over the books and records of the company, of course, unless a proper foundation had been laid for the introduction of the books, they could in nowise be used against the appellants. We doubt very much if the evidence would have been sufficient to have admitted the books against A. E. Sanders, the head of the enterprise and the individual who was the operating head of the business. But, be that as it may, the appellants herein were not operating the business of the stores company. They were simply selling stock for the purpose of financing the stores company and, therefore, the showing made upon which to base exhibits 89, 90 and 91 was not sufficient as to them. It must be remembered that counsel for the Government admitted in the court below that these books, (Government's Exhibits 34 to 39 for Identification, inclusive), *were but summaries of the original entry books* (370). It must be admitted by opposing counsel that all of the books and records were not in court and that such of the books and records as were in court were incomplete, indeed in part false. It is upon these books, that Exhibits 89, 90 and 91 are founded. We again respect-

fully submit that these exhibits were improperly admitted in evidence.

ADMISSION IN EVIDENCE OF GOVERNMENT'S EXHIBITS 109 AND 110

Counsel for the Government, on page 34 of their brief, argue that the cases we cited are not in point and claim that these exhibits were admissible in evidence as Government records. They cite *Heike* v. *United States*, 192 Fed. 83; and *White* v. *United States*, 164 U. S. 100. As stated in our opening brief, these cases were relied upon by the Government in the court below. We have fully analyzed those cases in our opening brief, at pages 176 and 177, and no more will be said about those cases.

However, it might be well to inquire whether or not these income tax cards are Government records. Counsel failed to cite any law making them public records, nor authorizing or requiring their filing or keeping as a public record. We have been unable to find any regulation of the Treasury Department requiring the keeping of these income tax cards, which are merely indexes, and inquiry at the office of the Collector of Internal Revenue at Phoenix discloses that these cards are kept, not under any regulation of the Treasury Department but under instructions relating to detail office procedural matters connected with the Bureau of Internal Revenue. It is well settled that,

> "Where there is no law making a certain paper a public record, nor authorizing or requiring its filing or keeping, it is not admissible as a public record; the filing and recording of such a paper adds

nothing to its validity and is not proof of its execution so as to authorize its admission in evidence." 16 *Corpus Juris*, 738, 739; Par. 1519.

Assuming, however, for the sake of argument that these income tax cards are public records, which we contend they are not, they are at best memoranda taken from the original income tax returns and are not the best evidence.

Counsel have failed, we believe, to understand one of the points raised in connectnon with the admission of these exhibits. Section 661, Title 28, U. S. C. A., as amended June 19, 1934, provides that,

"Copies of any books, records, papers, or other documents in any of the executive departments, * * * * * shall be admitted in evidence equally with the originals thereof, *when duly authenticated under the seal of such department*, * * * * * *".

It would seem to us that the only way you could admit in evidence any of the documents mentioned in Section 661, supra, would be to either admit the original, *or an authenticated copy thereof, under the seal of the department having the custody thereof.* Transcripts from the records of the executive departments, when authenticated by the seal of the department, are evidence both at common law and by statute. Compare: *Block* v. *United States*, 7 Ct. Cl. 406.

"The mode of authentication, as prescribed by law as transcripts from the executive department,

must be strictly pursued to make them evidence." *United States* v. *Harrill*, Fed. Cas. No. 15,310.

"A copy of a letter on the letterhead of the Bureau of Yards and Docks, and signed by one designating himself as Assistant to the Bureau, was not competent as a copy of the files of the Bureau, where it was not authenticated as required by statute." *Arnold* v. *Thompson & Spear Co.* 279 Fed. 307.

Of course it would be like carrying coals to New Castle to say that the regulations of the Treasury Department did not have the force and effect of law. See *Boske, etc.* v. *Comingore*, 177 U. S. 459, 44 Ed. 846.

This last mentioned case has recently been cited with approval by this Court in *Ex Parte Sackett*, 74 Fed. (2d) 922, 923, 924 (Advance Sheets of March 18, 1935). In the *Sackett* case this Court said:

"In *Boske* v. *Comingore*, supra, the Supreme Court of the United States sustained a rule of the Treasury Department with relation to the custody of documents, etc., similar to the rule adopted by the Attorney General with reference to the records of his department. It was there held that such a regulation was not inconsistent with law, was valid *and binding upon the courts*, and in effect held that under such a regulation the head of the department became the exclusive custodian of the records. In that regard the court said:

'In our opinion the Secretary (of the Treasury),

under the regulations as to the custody, use, and preservation of the records, papers, and property appertaining to the business of his department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.'" (Emphasis ours).

Counsel for the Government have not, we believe, comprehended the effect of *Corliss* v. *United States*, (C. C. A. 8), 7 Fed. (2d) 455, quoted from on page 172 of our opening brief.

The error in admitting these two exhibits to our minds is patent.

RESTRICTING THE CROSS-EXAMINATION OF WITNESS BRANDT

What we have said on our opening brief concerning this question is, we believe, sufficient to demonstrate to the Court that there was error committed in restricting our cross-examination of that witness. On page 42 of the Government's brief counsel say:

> "We have not deemed it necessary to discuss the authorities cited by appellants * * * * which support the right of cross-examination. We are in full accord with such a principle."

Indeed, we hardly blame counsel for not attempting to discuss those authorities, and earnestly insist that

they have full application to the point under consideration.

MOTION FOR DIRECTED VERDICT

We have previously argued the points with reference to the attempted identification of the Addie Driscoll letter (Government's Exhibit 43), and have not the time to properly take up other questions sought to be answered by the Government concerning the motion for a directed verdict. We have, we believe, fully presented the questions involved in our opening brief. It might be worth noting, however, that counsel for the Government have failed to discuss the point of law set forth in *Mandelbaum* v. *Goodyear Tire & Rubber Co.* (C. C. A. 8) 6 Fed. (2d) 818, which is discussed on pages 158, 159 and 160 of our opening brief. This case was cited in support of our contention that Exhibits 90 and 91 showed a condition of the stores company too remote from the commission of the offense, to-wit, April 9, 1930. Exhibits 90 and 91 purport to show a condition of the stores company in September of 1930, and Exhibit 89, a condition existing December of 1929. These conditions, we contend, are too remote from the date of the commission of the alleged offense.

CONCLUSION

We have not the time to discuss the question of variance and the instructions. Suffice it to say that we are relying upon our opening brief and upon the argument that will be made at the hearing of this case.

We again respectfully submit that the case should be reversed.

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We again respectfully submit that the case should be reversed.

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